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Special Feature: Eighth Colloquium on Challenges in International Refugee Law

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SPECIAL FEATURE
EIGHTH COLLOQUIUM ON CHALLENGES IN INTERNATIONAL REFUGEE LAW

INTRODUCTION

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Inherent in the very notion of a right to "seek" asylum is the ability to move. As a guarantee of surrogate or substitute national protection for seriously at-risk persons,[1] refugee law operates only outside the bounds of the refugee's country of nationality or habitual residence. This constraint is a pragmatic recognition that – notwithstanding some progress on bringing human rights to bear inside sovereign states[2] – the international community is presently truly able to *guarantee* rights only once an individual is beyond the reach of her home country. And *guarantees* of rights to the fundamentally disfranchised are precisely what refugee law promises: not only the right to be safe, but the right to join a new national community until and unless protection is restored at home.[3] So if an at-risk person cannot leave her country and enter some other state, then the protection promised by the Convention relating to the Status of Refugees cannot be delivered.

While fewer states today than during the Cold War era seek actively to block the departure of disfavored minorities, the ability to leave one's own country is today severely compromised by internationally sanctioned efforts to stop human trafficking (by definition an exploitative practice) and smuggling (consensual illegal border crossing).[4] However well-meaning these efforts to stop often dangerous voyages may be, it remains that the unlawful arrival of refugees is pragmatically required – both because no

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1. This understanding of refugee law has been endorsed by senior courts, including in *Minister for Immigration and Multicultural Affairs v Respondent S152/2003* (2004) 222 CLR 1 (High Court) (Austl.); Canada (Att'y Gen.) v. Ward, [1993] 2 S.C.R. 689 (Can.); and Horvath v. Secretary of State for the Home Dep't [2001] 1 AC (HL) 489 (appeal taken from Eng.).

2. The notion of a "responsibility to protect" – that would in principle ensure respect for the internationally guaranteed human rights of persons still inside their own country – remains very much a work-in-progress. *See generally* ANNE ORFORD, INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT (2011).

3. Convention relating to the Status of Refugees ("Refugee Convention") art. 1, Apr. 22, 1954, 189 U.N.T.S. 150 (defining "refugee" and identifying the beneficiary class for the rights set out in articles 2-34 of the Convention); *see generally* JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW (2005).

4. James C. Hathaway, *The Human Rights Quagmire of 'Human Trafficking*,' 49 VA. J. INT'L L. 1, 33-34, 37 (2008).

state issues a visa to travel to seek asylum and because the increasing sophistication of border controls creates the need and market for smugglers (and, for the truly impoverished, traffickers) to guide the refugee to the asylum that is in principle on offer. Yet the notion that a refugee, in order to save her life, should have to first put her life on the line by entrusting herself to a smuggler or trafficker is surely repugnant. How does one reconcile the imperative to combat exploitation to the importance of ensuring the availability of escape routes to safety?

Even if able to reach the border of a safe country, refugees increasingly confront blunt barriers – fences, walls, and the like – that prevent them from making their claims to protection. While the core legal duty of *non-refoulement* precludes a state party to the Refugee Convention from sending a refugee away "in any manner whatsoever,"[5] is there a breach of this duty if the refugee is effectively turned away by the mere existence of a non-responsive, man-made barrier? More generally, is it right to see the duty of *non-refoulement* as absolute even if, for example, the numbers arriving to seek protection are clearly beyond the receiving country's capacity?

Nor do constraints on movement end if refugees are able to cross the border into a safe state. To the contrary, many countries routinely detain refugees arriving to seek protection for no reason other than the fact that their arrival has not been pre-authorized. In some states that detention is ongoing, including during what can be many years pending a decision on the asylum application. Even when refugee status is recognized, refugees may still find themselves unable freely to choose their place of residence, to move internally, or to travel abroad. At what point must the reasonable interests of a host state in ensuring order within its territory yield to the imperative to not only treat refugees with dignity but also enable them to reestablish their lives with freedom and opportunity?

Lastly, freedom of movement can be an issue even when protection is restored in the refugee's home country, meaning that refugee status at international law comes to an end and repatriation may, at least in principle, lawfully be pursued. In practice, too many states pursue repatriation prematurely or on the basis of other than the authentic Convention cessation standards,[6] causing refugees to be dispatched to places of risk or endemic suffering.[7] Equally sadly – if at times, understandably – the return of refugees who wish to reestablish themselves in their country of origin may be resisted by that country's government, particularly where it struggles to recover from war or other disaster. In both these contexts, international law must strive to balance the legitimate concerns of states (reasonably seeing their risk-based duty of protection to come to an end, or wishing to ensure the stability of a fragile country of origin) and the equally legitimate concern of refugees not to be unfairly compelled to leave the asylum

5. Refugee Convention, *supra* note 3, Art. 33(1).

6. Refugee Convention, *supra* note 3, Art. 1(C).

7. *See* HATHAWAY, *supra* note 3, at 922-35.

country, or conversely, to freely exercise their right to go back to their homes.

Movement in all of its senses – to leave a dangerous country, to get into a safe state, to avoid unjustified detention or other constraints once there, to enjoy the mobility requisite to a free and productive life, and to go home if and when conditions truly allow – is thus an ever-present concern throughout the refugee journey. From a legal optic, refugee freedom of movement is an issue regulated under an often-confusing amalgam of refugee law and the increasingly vibrant norms of international human rights law. States and international organizations have thus struggled to understand both the interrelationship of refugee-specific and general legal standards, and more generally to appreciate the ways in which that synthesized body of international law ensures both the meaningful protection of refugees and respect for the fundamental interests of the states that receive them.

Against this backdrop, the ambitious goal of the Eighth Colloquium on Challenges in International Refugee Law was to develop a principled and workable framework to guide the process of defining the rights of refugees to freedom of movement. Working with refugee law expert Professor Marjoleine Zieck of the University of Amsterdam, a group of senior University of Michigan law students first researched the issue from the optic of both international law and comparative state practice.[8] Professor Zieck then drew on this research to author a comprehensive background study which was refined by a second group of senior Michigan law students.[9] A select group of highly regarded international scholars and jurists was then invited to meet with a third group of Michigan law students over three days in March and April 2017 to debate the issues raised in the revised background study (and published in this issue) and to agree to the standards that comprise the "Michigan Guidelines on Refugee Freedom of Movement."[10]

It is our hope that, as in the case of earlier Michigan Guidelines on the International Protection of Refugees,[11] these unanimously agreed stan-

8. The members of the Comparative Asylum Law seminar in fall 2015 who conducted this research were Adrienne Darrow Boyd, Carol (Liz) Bundy, Alina Charniauskaya, Ian Green, Iris Kessels, Alison Lisi, Stephanie Motz, Jennifer Nelson, Kate Ogg, Megan Pierce, Vladislava Stoyanova, Karima Tawfik, and Kelsey Vanoverloop.

9. The members of the Refugee Law Reform seminar in fall 2016 who vetted and refined the draft study were Nessma Bashi, Soojin Cha, Erin Collins, Ariel Flint, Allison Hight, Thalia Lamping, Matthew Lind, Jennifer Nelson, Salvatore Nicolosi, Mariana Pereira, Eric Sloat, Francis (Tom) Temprosa, Xun Yuan, and Kristine van Doorn.

10. James C. Hathaway et al., *The Michigan Guidelines on Refugee Freedom of Movement*, 39 Mich. J. Int'l L. 5 (2017).

11. Earlier guidelines have also been published in the Michigan Journal of International Law. James C. Hathaway et al., *The Michigan Guidelines on Risk for Reasons of Political Opinion*, 37 MICH. J. INT'L L. 234 (2016); James C. Hathaway et al., *The Michigan Guidelines on the Exclusion of International Criminals*, 35 MICH. J. INT'L L. 3 (2013); Penelope Mathew et al., *The Michigan Guidelines on the Right to Work*, 31 MICH. J. INT'L L. 293 (2010); James C. Hathaway et al., *The Michigan Guidelines on Protection Elsewhere*, 28 MICH. J. INT'L L. 207 (2007); James C. Hathaway et al., *The Michigan Guidelines on Well-*

dards will inspire a thoughtful and principled debate among scholars, officials, and judicial and other refugee law decision-makers committed to the legally accurate and contextually sound application of international refugee law norms.

Founded Fear, 26 MICH. J. INT'L L. 491 (2005); James C. Hathaway et al., *The Michigan Guidelines on Nexus to a Convention Ground*, 23 MICH. J. INT'L L. 210 (2002); James C. Hathaway, *The Michigan Guidelines on the Internal Protection Alternative*, 21 MICH. J. INT'L L. 131 (1999).